INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	9
Conclusion	11
Appendix	12

CITATIONS

Cases:	
National Labor Relations Board v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241	9
National Labor Relations Board v. *Southern Bell Telephone Co.*, 319 U. S. 50	10
Westinghouse Electric & Mfg. Co. v. *National Labor Relations Board*, 112 F. 2d 657, affirmed *per curiam*, 312 U. S. 660	10
Statute:	
National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq*):	
Section 7	12
Section 8 (1)	12
Section 8 (2)	12
Section 10 (a)	12
Section 10 (b)	12
Section 10 (c)	13
Section 10 (d)	13
Section 10 (e)	13
Section 10 (f)	15

722643—46——1

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 663

WILSON & CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 791–797) is reported in 156 F. 2d 577. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 35–65) are reported in 63 N. L. R. B. 636.

JURISDICTION

The decree of the court below (R. 803–806) was entered on August 17, 1946. A petition for rehearing (R. 807–815) was denied on September 13, 1946 (R. 816). The petition for a writ of certiorari was filed on November 2, 1946. The jurisdiction of this Court is invoked under Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

Whether, in a proceeding brought to review a finding of the National Labor Relations Board that petitioner dominated a labor organization, the court below properly denied petitioner's motions to include additional evidence in the record which would show

(a) that subsequent to the entry of the Board's order the employees at the plant involved voted not to be represented by the union which filed the charges of company domination; and

(b) that petitioner's relationship with admittedly bona fide labor organizations at its other plants was similar in character to its relationship with the organization which the Board found company-dominated.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12–15.

STATEMENT [1]

Upon the usual proceedings, the Board, on August 30, 1945, issued its findings of fact, con-

[1] In the following statement, the references preceding the semicolons are to the findings of the trial examiner which the Board adopted (R. 35), and the succeeding references are to the supporting evidence.

clusions of law and order (R. 35–42). The facts as found by the Board and shown by the evidence may be summarized as follows:

During the early 1920's petitioner initiated and imposed upon its employees at its Oklahoma City plant an employee representation plan called the Joint Representation Committee Plan, herein referred to as the Joint Plan (R. 45–46; 96, 100, 120–121). The Joint Plan operated in accordance with the provisions of a printed plan issued and distributed by petitioner among its employees (R. 45; 100–103, 469–478). The administration of the Joint Plan was vested in a Joint Representative Committee composed of five elected employee representatives and an equal number of management representatives appointed by petitioner (R. 45; 99–100, 470). Committee members were paid for time spent attending the meetings (R. 46; 121, 475–476). Petitioner's president was final arbiter of any dispute between employee and management representatives (R. 46; 476–477). The organization assessed no dues and had no treasury; petitioner at its own expense provided meeting places for the Joint Committee (R. 46; 475). The Joint Plan functioned continuously in this way until October 1935, shortly after the effective date of the National Labor Relations Act (R. 46; 122–123).

During September 1935, at a meeting of both management and employee representatives of the Joint Plan, a management official submitted to

the Joint Committee details of a substitute "plan" which he stated had been in operation at "other places" like petitioner's Kansas City plan and "was much better than the old plan" (R. 36, 46–47; 122–124, 127–128, 139). According to the revised plan, which the management official read, there were to be no management representatives on the committee (R. 47; 124, 127–128). The substitute plan was adopted without modification (R. 36, 47; 124). In October 1935 employee representatives were elected to serve under the "new set-up" which was known as the Employees Representative Committee, herein called the ERC (R. 47; 99–100, 103–106). William J. Lassiter, who previously had served on the Joint Plan as management representative and had been chosen as an employee representative in 1934–1935, was elected to the ERC and served as its first chairman (R. 47; 120–122). Since 1935 the ERC has operated under an organizational structure similar to the Joint Plan, except that direct management participation was eliminated (R. 36, 47; 141–143). No general membership meetings have been held, the affairs of the ERC being handled exclusively by the elected committee (R. 47; 202). Plant Superintendent Kellert has represented petitioner in dealing with the committee, which has devoted itself, as did the Joint Plan, to matters involving the welfare of the employees (R. 49–50; 128, 429–430, 470). Petitioner has at no time made any announcement to its employees

that the Joint Plan has been dissolved or disestablished (R. 36, 46; 140–141).

Petitioner has continued to grant the ERC the same privilege it formerly extended to the Joint Plan of using a meeting place adjacent to its plant offices, where regular and special meetings are held during working hours, and committee members are paid their regular wages while attending these meetings (R. 36, 48; 375, 432). Petitioner has, in addition, permitted the secretary of the ERC to use its mimeograph machine for the preparation of ERC documentary material (R. 48; 359–360).

During the latter part of 1942 the United Packinghouse Workers of America, Local 227, CIO, herein called the Union, began a campaign to organize petitioner's employees (R. 36, 49; 210–211, 459). About the same time the question of dues was discussed at an ERC committee meeting (R. 36, 49; 168–169, 208–209, 214–216). Superintendent Kellert advised the representatives at this meeting that the collection of dues was unnecessary as the employees were getting gratuitously from the ERC what employees at the nearby Armour packing plant were "paying for" as members of the Union (*ibid.*). Thereafter, Kellert turned over to the ERC the monthly commissions which petitioner received from vending machines installed at the plant (R. 36, 49; 208–209, 321–323, 325). Although Kellert had been meeting with the committee of the ERC no

written collective bargaining agreement had ever been executed (R. 49–50). Further, the ERC had neither membership cards nor lists and all nonsupervisory employees "automatically" became members of the organization (R. 36, 47; 373–374, 470). With the advent of the Union, however, Kellert advised the committee of the ERC at one of its meetings that, before petitioner could execute a written agreement with it, the ERC would have to "be in a position to show, if it ever came up," that it represented a majority of the employees at the plant (R. 50; 214). Membership cards were thereupon distributed by the committee to ERC representatives, who signed up the employees during regular working hours with the knowledge and assistance of petitioner's supervisory employees (R. 36, 50; 105–106, 147–149, 168, 208). After the ERC had completed its solicitation, petitioner recognized it as the sole collective bargaining agent for the employees and on June 11, 1943, a contract was executed by the parties (R. 36, 51; 455–456, 696, 706–714). The contract was for a period of one year, with an automatic renewal clause (R. 51; 706–714). On May 16, 1944, the parties stipulated that the contract should remain in effect until certain changes should be agreed upon (R. 51; 496). The original contract is, therefore, still in effect.

Petitioner also gave unlawful support to the ERC in other ways. In September or October 1942, Kellert called employee Deitrick to his of-

fice and accused him of trying to organize the freezer department for the Union; Kellert advised Deitrick there was no need for "further protection," as petitioner had a "company union," and that, if the Union was recognized, the employees would be compelled to pay dues to the Union (R. 36–37, 55; 235–237, 436–437). During February 1944, Kellert summoned employee Blankenship to his office and accused him of soliciting two employees for the Union on petitioner's premises (R. 55; 254–256). Although Blankenship denied the accusation, Kellert stated he did not want any "CIO cards signed up" on petitioner's property and warned Blankenship "not to sign a thing on these premises" without his permission (*ibid.*). About the same time, Blankenship was also warned about his union activities by Foreman Jones, who informed Blankenship that he had been advised by a "good responsible person" that, if Blankenship did not "cut out the union talk," his department would be "minus another man" (R. 55–56; 256–257). In April 1944, when Blankenship complained to Kellert that his hours had been reduced, Kellert remarked, "Don't come to me with things like that, the things you're a-doin'." When Blankenship asked what he meant, Kellert replied, "You know as well as I do" (R. 35, 56; 258–260).

Upon these facts, the Board concluded that petitioner by dominating and assisting the ERC,

722643—46——2

by contributing financial support thereto, and by the anti-union statements and conduct of Superintendent Kellert and Foreman Jones, had engaged in unfair labor practices within the meaning of Section 8 (1) and (2) of the Act (R. 35–37). Accordingly, the Board ordered petitioner to cease and desist from the unfair labor practices found, to cease giving effect to any contract between petitioner and the ERC, to withdraw recognition from and disestablish the ERC as representative of any of its employees for collective bargaining purposes, and to post appropriate notices (R. 39–40).

Thereafter, petitioner, on September 17, 1945, filed in the court below a petition for review and to modify or set aside the order of the Board (R. 1–6). The Board, on October 15, 1945, filed its answer and request for enforcement of the order (R. 7–9). Subsequently, on May 3, 1946, petitioner filed a motion to adduce as additional evidence Board records which would show that subsequent to the entry of the Board's order the employees at the plant involved voted not to be represented by the Union (Supp. Tr. 2–15).[2] On May 11, 1946, the Board filed its opposition to the motion (Supp. Tr. 16–18). On May 11, 1946, petitioner filed a second motion to adduce additional evidence to show that petitioner's relation-

[2] The documents pertaining to the motions to adduce are printed in a separate volume entitled Supplemental Transcript of Record which is herein referred to as "Supp. Tr."

ship with the CIO at its other plants was similar in character to its relationship with the ERC (Supp. Tr. 18–27).

The court below in its opinion, entered July 8, 1946, denied petitioner's first motion (R. 794), and held that it was unnecessary to pass upon the admissibility of the evidence sought to be adduced in the second motion since even if admitted the evidence would not alter the outcome of the case (R. 795). On August 17, 1946, the court entered its decree enforcing in full the order of the Board (R. 803–805). On September 6, 1946, petitioner requested a rehearing (R. 807–815). The court denied the petition for rehearing on September 13, 1946 (R. 816).

ARGUMENT

1. The evidence as to how employees voted in a Board-conducted election held subsequent to the Board's order in the instant case was in no way relevant to the validity of the Board's order requiring disestablishment of the ERC. The latter organization was not on the ballot. The vote of the employees to reject the Union did not necessarily indicate a preference for the ERC. The negative vote might conceivably reflect a desire not to be represented by any labor organization. But even if the ERC had been chosen by the employees in an election, such a choice would not have required that the Board's order be set aside. *National Labor Relations Board* v. *Newport News*

Shipbuilding & Drydock Co., 308 U. S. 241, 248–251. Cf. *National Labor Relations Board* v. *Southern Bell Telephone Co.*, 319 U. S. 50, 59; *Westinghouse Electric & Mfg. Co.* v. *National Labor Relations Board*, 112 F. 2d 657, 659 (C. C. A. 2), affirmed *per curiam*, 312 U. S. 660. None of the cases cited by petitioner (p. 7) deals with this question.

2. Petitioner's second motion to include additional evidence in the record (Supp. Tr. 18–27), is based on the premise that evidence of petitioner's conduct and dealings with labor organizations at other plants is material and would "legally justify certain of petitioner's practices" toward the ERC (Pet. 8–9). The only issue before the Board was whether petitioner had unlawfully dominated and assisted the ERC at its Oklahoma City plant, in violation of Section 8 (2) of the Act. Assuming that petitioner had collective bargaining agreements with bona fide unions at other plants, wherein concessions had been granted as the results of genuine bargaining, such conduct would have no bearing upon petitioner's course of action toward the Oklahoma City employees who were not even combined with those employees in a unit appropriate for the purposes of collective bargaining. Moreover, as the court below held (R. 791–797), the evidence as summarized in the Statement (*supra*, p. 2) affords full support for the Board's findings.

Even if the proffered evidence was admitted and considered, it would not change the final result. It was unnecessary, therefore, to pass upon the question of the admissibility of such evidence (R. 795).

CONCLUSION

The decision of the court below is correct and presents neither a conflict of decisions nor any question of general importance. The petition for a writ of certiorari should therefore be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.

GERHARD P. VAN ARKEL,
General Counsel,
MORRIS P. GLUSHIEN,
Associate General Counsel,
RUTH WEYAND,
REEVES R. HILTON,
Attorneys,
National Labor Relations Board.

NOVEMBER, 1946.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1945, 49 Stat. 449, 29 U. S. C. 151 *et seq.*), are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the

Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatment of employees with or without back pay, as will effectuate the policies of this Act. * * *

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the

pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court

as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence shall in like manner be conclusive.

U. S. GOVERNMENT PRINTING OFFICE: 1946